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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91181755
Party	Defendant BeauxKat Enterprises LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRANCISCAN VINEYARDS	)	
	)	Mark: BLACK RAVEN BREWING COMPANY
Opposer	)	Opposition No.: 91181755
v.	)	Serial No.: 77223446
	)	
BEAUXKAT ENTERPRISES LLC	)	
	)	
Applicant	)	
	)	

**APPLICANT’S RESPONSE TO OPPOSER’S MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Opposer Franciscan Vineyards, Inc.’s (“Franciscan”) evidence that it claims supports summary judgment in this case is summarized as follows: Franciscan has marks, Franciscan uses its marks, restaurants often sell beer and wine in the same location and on the same menu, and liquor stores often sell both beer and wine. Based on this evidence alone, Franciscan asks the Board to find that Applicant BeauxKat Enterprises, LLC’s (“BeauxKat”) requested mark, BLACK RAVEN BREWING COMPANY, has a likelihood of confusion with Franciscan’s marks.

To support this allegation, Franciscan asks the Board to disregard a statement made by the Federal Circuit in *In re Coors Brewing Co.*<sup>1</sup> in favor of an unpublished decision that this Board, under its own rules, may not consider as a precedent.

Regarding the *DuPont* factors, the truth is that there are facts in support of both parties positions. As such, under the rules and case law governing Summary Judgment motions, Franciscan’s motion must be denied.

**II. STATEMENT OF FACTS**

**A. Response to Franciscan’s Factual statement.**

Franciscan’s statement of facts is mostly accurate, in that it states that Franciscan has marks and that it uses its marks. Indeed, BeauxKat does not dispute that Franciscan’s marks

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<sup>1</sup> 343 F.3d 1340, 1342, 68 USPQ 1059 (2003).

exist, nor that they are used. The key points, however, that must be garnered from Franciscan's recitation of its products and their distribution is that Franciscan does not make, market, or have any economic interest that has anything to do with beer. Even in reciting the nature of the barbecues held at their public picnic facility, there is no mention of beer being served. Indeed, one would be surprised to find a winery of Franciscan's nature serving beer on their premises. This is because beer and wine have at their core a different target market.

Also important to note, only three of Franciscan's nine named marks are for wine. The others are for such far-ranging products as barbeque sauce and clothing.

Franciscan devotes much of its effort to describing the fact that many beverages share some distribution channels. No one disputes that some restaurants, liquor stores, and markets sell both beer and wine. However, Franciscan ignores entirely the differences between the merchandising of beer and wine (and of course other beverages). In that context, beer and wine are treated completely differently.

In the Declaration of Doug Engler, filed with this response, Mr. Engler, a retailer who devotes his entire professional life to beer and wine, describes in detail the differences in markets and merchandising of beer and wine.<sup>2</sup> In truth, the markets treat these products differently, and they are marketed to different people, as evidenced further by a study done for the Wine Institute in California, which identified the markets as separate and distinct, showing that even the demographics of the beer and wine markets differ considerably.<sup>3</sup>

**B. BeauxKat's background.**

BeauxKat Enterprises, LLC was formed in January 2007 by its principals, Robert "Beaux" Bowman and Katherine Gillespie. BeauxKat was formed from its principals desire to open a local brewery and taproom where Beaux's original microbrews would be featured.<sup>4</sup> Beaux is an award-winning brewer who has been involved in brewing beers for nearly eight years.<sup>5</sup>

BeauxKat's intent for the use of its mark is simple. They want to protect their right to use their mark on their beers. That is it in a nutshell. They are not seeking to trademark its use

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<sup>2</sup> Engler Dec. ¶5-6.

<sup>3</sup> Bowman Dec. Ex. D.

<sup>4</sup> Bowman Dec. ¶7-9.

<sup>5</sup> Bowman Dec. ¶3-6.

on any other type of product. They intend to be a local microbrewery in the Seattle area market. This may eventually involve some level of distribution of its product, as microbreweries sometimes have their beers available at other brewpubs. This will also likely involve the presentation of BeauxKat's beers at some national events, specifically the Great American Beer Festival in Denver, Colorado, and the Craft Brewers Conference/World Beer Cup.<sup>6</sup>

### **C. Procedural History.**

BeauxKat filed its application for its mark on July 6, 2007. The Application was filed online using the TEAS system. The application was for a word mark only for the words BLACK RAVEN BREWING COMPANY (the "Mark"), disclaiming any exclusive right to use "brewing company."<sup>7</sup>

After the mark was initially approved by the examiner, it was published for opposition on December 18, 2007 with Franciscan's opposition being filed in January 2008. BeauxKat's answer was filed timely, and the parties have exchanged Initial Disclosures and fully responded to all exchanged discovery requests.

## **III. ARGUMENT**

### **A. Summary Judgment Standard.**

The summary judgment standard set out in section 528 of the TTAB Manual of Procedure does not differ from that used in the federal courts nation-wide. Franciscan accurately states the portion of those rules that they take time to cite. The portion they have ignored is significant, as it contains the description of Franciscan's burden on this motion:

A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. This burden is **greater** than the evidentiary burden at trial (emphasis added).<sup>8</sup>

Significantly, Franciscan also has the burden of proof at trial as the opposer.<sup>9</sup>

Franciscan also did not call out the requirement that "the nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist; and the

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<sup>6</sup> Kurth (Opposer) Dec., Ex. 4, Response to Interrogatory no. 3.

<sup>7</sup> Bowman Dec. Ex. E.

<sup>8</sup> TBMP §528.01

<sup>9</sup> *Massey Junior College, Inc., v. Fashion Institute Of Technology*, 492 F.2d 1399, 1403, 181 U.S.P.Q. 272 (1974).

evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the non-moving party.”<sup>10</sup>

**B. Genuine issues of material fact exist on each of the three *DuPont* factors called out by Franciscan.**

Franciscan names three of the *DuPont* factors as “primary, controlling factors” in this matter. As these are the only factors briefed by Franciscan in its materials, we only address the other factors briefly as the Board should not grant summary judgment based on issues not raised in this motion.

**1. An issue of fact exists on whether the marks are similar.**

Franciscan dissects the opposing marks considerably to arrive at its contention that the fact that its marks and the Mark both contain the word “raven” and that this commonality necessarily means that this *DuPont* factor is in Franciscan’s favor. However, a look at the remainder of the marks shows otherwise.

Franciscan’s dissection is not appropriate. The *Massey* court, cited above, addressed this issue very specifically:

That marks must be considered in their entireties in determining whether there is likelihood of confusion or mistake is a basic rule in comparison of marks. Here the board, having determined that the services of the parties were ‘generally similar,’ sought to establish an exception to the rule, namely: if the most prominent feature of a mark creates a commercial impression separate and apart from the remaining features of the mark, any confusing similarity with respect to it is determinative with respect to the mark in its entirety. We know of no authority which supports such an exception and hold that the board erred on this point.<sup>11</sup>

Franciscan commits the exact error in its briefing. They focus on one aspect of the Mark, and call it the “dominant portion.” While there is law sometimes allows analyzing more dominant portions of marks, the law is clear that the examination may not completely disregard the marks in their entirety. This Board must examine the marks in their entirety.

Interestingly, it is a case that factors prominently in the next factor to be examined that provides a guideline for the analysis of this factor. The Court in *In re Coors Brewing Co.* was called on to analyze the similarity of two pictorial marks that featured the words “Blue Moon”.

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<sup>10</sup> TBMP §528.01

<sup>11</sup> *Massey*, *supra*, 492 F.2d at 1402.

Both marks contain the words “Blue Moon” in all capital letters, and those words are prominent in each mark. The Coors mark contains the disclaimed words “Brewing Co.,” but because those words appear at the bottom of the mark in significantly smaller font, it was reasonable for the Board to find that those words do not significantly contribute to distinguishing the two marks.

...  
Although we uphold the Board's finding that the two marks are generally similar, principally because they both use the term “Blue Moon,” we note that similarity is not a binary factor but is a matter of degree. Because there are significant differences in the design of the two marks, the finding of similarity is a less important factor in establishing a likelihood of confusion than it would be if the two marks had been identical in design or nearly indistinguishable to a casual observer. See, e.g., [\*Century 21 Real Estate Corp. v. Century Life of Am.\*, 970 F.2d 874, 877 \(Fed.Cir.1992\)](#); [\*In re Opus One, Inc.\*, 60 USPQ2d 1812, 1815, 2001 WL 1182924 \(TTAB 2001\)](#).<sup>12</sup>

Comparing this analysis to our facts at hand, it seems that the fact that the two marks may contain a single common feature is not the end of the analysis here. What is clear is that like the two marks in *Coors* the marks here are not indistinguishable or even identical in design. Indeed it is hard to see how a consumer would look at the celtic design of Franciscan’s pictorial marks (or even its word marks) and be confused by the word mark of BeauxKat. Therefore, before we even consider whether or not there is a similarity, we must start with the premise set by the *Coors* court: that any similarity found is less important in the likelihood of confusion analysis than other factors because the marks do have significant differences, even if they share a word.

Franciscan argues that under this factor the Board may consider its pictorial marks to be the equivalent of a word mark (sometimes called the “equivalence” principle). While they correctly cite this principle, a look at the cases to which Franciscan cites is illuminating on the proper application of this principle. In the *In re Duofold* case, the marks being compared were the words GOLDEN EAGLE and a pictorial representation of a golden eagle.<sup>13</sup> In the *Spaulding Bakeries* case, the marks being compared were the

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<sup>12</sup> *In re Coors Brewing Co.*, 343 F.3d 1340, 1344, 68 U.S.P.Q.2d 1059 (2003).

<sup>13</sup> *In re Duofold*, 184 USPQ 638, 638-9 (TTAB 1974).

words OLD MILL and a pictograph of an old fashioned mill.<sup>14</sup> In the *Coors* case cited above, the marks being compared used identical words, BLUE MOON.<sup>15</sup> The point is that in these situations where a pictorial representation was found to be similar to the word mark, the word mark and the picture were an exact match: a picture of a golden eagle and the words GOLDEN EAGLE, a picture of an old mill and the words OLD MILL. Therefore the analysis stated by Franciscan was true in those cases, the picture could spark a perfect recollection of the mark, because they had identity.

The *Spaulding Bakeries* Court warned against taking this type of analysis too far. They added additional conditions to making this leap:

[N]ot only must the pictorial representation be readily recognized by the average purchaser of the goods involved as the equivalent of a literal term, but it must be of such a nature that the purchaser would be prone to “translate” and not accept it for what it is, namely, a design mark in the normal or average marketing environment for the goods with which it is used.<sup>16</sup>

The Court added that the burden of proof of establishing that purchasers act as set forth above is on the party who is attempting to use the equivalence principle.<sup>17</sup>

Applying these principles to the case at hand, we see that first, the pictorial marks of Franciscan consist of ravens. If BeauxKat was seeking to register the word RAVEN alone, then the equivalence principle might apply. But BeauxKat’s mark is BLACK RAVEN BREWING COMPANY. This lack of identity becomes more telling because Franciscan has not offered any evidence that purchasers would act as described by the *Spaulding Bakeries* Court above. Absent any such evidence, the Board should not equate Franciscan’s pictorial marks with BeauxKat’s Mark and as to the pictorial marks, there is not similarity.

Franciscan may not dissect the marks in question to compare only parts of the mark, and therefore its word marks are not similar to the Mark, and they have not offered sufficient evidence to allow them to equate their pictorial marks with the Mark (making

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<sup>14</sup> *Spaulding Bakeries, Inc. v. Interstate Brands Corp.*, 209 USPQ 355, 356 (TTAB 1980).

<sup>15</sup> *In re Coors Brewing Co.*, *supra* at 1344.

<sup>16</sup> *Spaulding Bakeries, Inc.*, *supra* at 356.

<sup>17</sup> *Id.*

this a factual issue to be determined at trial). Therefore, the *DuPont* factor regarding similarity or dissimilarity of the marks must be found in favor of BeauxKat, or at the very least, a genuine issue of fact on this factor exists such that summary judgment would be inappropriate.

**2. Beer and wine are not related products.**

Franciscan goes to great lengths to try and show that beer and wine are related products. Of note, however, is that Franciscan does not claim that its other products, barbeque sauce and clothing items, are related products, therefore, with regard to this *DuPont* factor as regards the opposition based on Franciscan's non-wine marks, this factor favors BeauxKat.

a. Franciscan's argument that beer and wine are related products is based on a non-precedential determination.

To a large extent, Franciscan's entire motion is based upon its analysis of the *In re Saviah Rose Winery* matter.<sup>18</sup> However, it must be noted that *In re Saviah Rose Winery* was a Board decision on appeal from the Examining Attorney's refusal to register a mark, and as such, was not a published opinion. Indeed, all versions of the opinion contain specifically the notation "THIS OPINION IS NOT CITABLE AS PRECEDENT OF THE TTAB".<sup>19</sup> As such, Franciscan's reliance on this case is misplaced, and BeauxKat requests that all mention and argument based upon the *In re Saviah Rose Winery* opinion be stricken.

Franciscan may argue in reply that if the Board cannot consider the *Saviah Rose* decision, neither can they consider the Board's decision in *Coors*, as that too was a non-citable opinion.<sup>20</sup> However, there is a critical difference. The Board's decision in *Coors* was appealed to the Federal Circuit, where a specific mention of the Board's decision that beer and wine are not related products was made. Therefore, whether it is dicta or not, that determination is of record in a citable opinion and should be given its precedential due.

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<sup>18</sup> Franciscan refers to this matter as "In re Savia Rose Winery" but we note that the proper spelling is "Saviah Rose Winery".

<sup>19</sup> *In re Saviah Rose Winery*, 2006 WL 2414518 (TTAB Serial No. 78433647, August 4, 2006).

<sup>20</sup> *In re Coors Brewing*, 2002 WL 1766343 (TTAB Serial No. 75/599,304, July 31, 2002).



b. The other opinions cited by Franciscan are not on point.

Franciscan lists three other opinions that are citable to support its contention that beer and wine are related products. A closer look at these cases indicates that they are not on point in this matter.

First and foremost is the *In re Sailerbrau Franz Sailer* case.<sup>21</sup> In that case, as was the case in all three of the cited matters identified by Franciscan, there was identity between the two marks. In *Sailerbrau*, the marks were CHRISTOPHER COLUMBUS for beer, and CRISTOBOL COLON for wine. The second mark being merely the Spanish/Portuguese translation of the first.<sup>22</sup> The *Sailerbrau* Board then went on to describe the commonalities in the distribution and marketing chains for both beer and wine, much in the way that Franciscan has done.<sup>23</sup>

However, ten years later, the Board, with the backup of the Federal Circuit, found that beer and wine were specifically not related products, despite the commonalities found in the *Coors* matter.<sup>24</sup> Why this distinction? On their faces, it appears that the only significant difference between the cases is that in the *Coors* case, the marks did not share identity, as they did in *Sailerbrau* (and in both *Fruit Industries*<sup>25</sup> and *Krantz*<sup>26</sup>). In *Coors*, at least the pictorial representations to which the common words were attached were different, differences called out specifically by the *Coors* court: "... there are significant differences in the design of the two marks, ...".<sup>27</sup> It would seem that the identity of marks is a clear factor in the determinations made by each of these courts as to the decision not to allow the second registration.

The *Fruit Industries* and *Krantz* cases further support this idea. In *Fruit Industries*, the parties had at one point had an agreement as to the use of the LA FIESTA mark, but when a use outside that contract was made, the first called out factor in upholding the

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<sup>21</sup> *In re Sailerbrau Franz Sailer*, 23 U.S.P.Q.2d 1719 (TTAB 1992).

<sup>22</sup> Incidentally, the Spanish translation for "raven" is "Cuvero", which is registered for tequila and other related products in over 20 marks by the Jose Cuervo company.

<sup>23</sup> *Sailerbrau*, at 1720.

<sup>24</sup> *Coors*, *supra* at 1342.

<sup>25</sup> *Fruit Industries, Ltd. V. Ph. Schneider Brewing Co.*, 146 F.2d 310, 46 USPQ 487 (Commr. of Patents 1940) (LA FIESTA for beer and LA FIESTA for wine).

<sup>26</sup> *Krantz Brewing Corp. v. Henry Kelly Importing & Dist. Co., Inc.*, 215 F.2d 284, 96 USPQ 219 (Patent Off. Examiner in Chief 1953) (OLD DUTCH for both wine and beer).

<sup>27</sup> *Coors*, *supra* at 1344.

opposition was not the related nature of the goods, but the identity of the two marks: “In the instant case the marks of the parties are identical, and their goods are of the same descriptive properties. It follows that the opposition was properly sustained, regardless of opposer's consent to applicant's use of the mark.”<sup>28</sup> In *Krantz*, the analysis was mostly regarding a laches defense, and so is inapplicable, but the Examiner’s decision was shaped greatly by the fact that the marks were identical:

I agree with the Examiner of Interferences that confusion or mistake or deception of purchasers as to the origin of the goods is quite likely to arise from the contemporaneous use of the **identical** marks in question on beer and wine (emphasis added).<sup>29</sup>

In short, it seems that there is a correlation between a finding likelihood of confusion between beer and wine (whether or not they are related products) when the marks are identical in nature. This is one explanation for the decision of the *Coors* Board as upheld by the Federal Circuit.

The other explanation is that the *Coors* Board may have understood that simply because two items are sold in the same retailers does not make confusion necessarily more likely. Franciscan’s evidence is solely dedicated to this point: that beer and wine have common retailers.

However, BeauxKat has submitted evidence from a retailer, Doug Engler, as well as an industry periodical article detailing a study for the Wine Institute of California that point out the differences in the market for beers and wines.<sup>30</sup> These markets are not the monolith that Franciscan likes to portray. Moreover, Franciscan’s own practices show the difference in the end users of these products, as they apparently do not serve beer at their events. Beer buyers and wine buyers are generally separate and distinct groups, and while the locations of the retailing may overlap, the same can be said for many products, including cheese, hard liquor<sup>31</sup>, other foods, and even restaurant services (noting that the *Coors* Court definitively established that beer and restaurant services are unrelated products<sup>32</sup>).

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<sup>28</sup> *Fruit Industries, supra* at 487.

<sup>29</sup> *Krantz, supra* at 220.

<sup>30</sup> Engler Dec. ¶5-6; Bowman Dec. Ex. D.

<sup>31</sup> Noting the concurrent registration of the CUERVO family of marks for tequila and associated items.

<sup>32</sup> *Coors, supra* at 1346.

In short, there are facts from which a trier of fact can find that beer and wine are non-related products. That a Board, with the support of the Federal Circuit, has already made such a finding makes it truly clear that this is an issue on which summary judgment is not appropriate.<sup>33</sup>

**3. Issues of fact exist regarding the similarity of established, likely-to-continue trade channels.**

Franciscan's argument on this *DuPont* factor is simple: beer and wine are sold in restaurants, liquor stores and markets. However, this is an oversimplification of this factor. For instance, if Franciscan's analysis were the methodology for reviewing this factor, every item sold in a supermarket could potentially be subject to trademark cancellation on the basis of likelihood of confusion.

As we have already established, there are third party registrations for similar "raven" marks in other alcoholic beverages (specifically the CUERVO family of marks). These items are likewise sold in restaurants and liquor stores, but do not cause any confusion with Franciscan's marks, or at least are presumed to not cause confusion at this point. Therefore, the fact that these products are sold in the same locations cannot be the basis for a likelihood of confusion finding.

Moreover, BeauxKat, as stated above, has provided evidence supporting the idea that beer and wine have significantly defined markets that do not overlap much.<sup>34</sup> This evidence, supported as it must be on summary judgment by considering it in the light most favorable to BeauxKat, shows that there is at least an issue of fact as to whether or not this factor supports BeauxKat or Franciscan, making summary judgment improper.

**4. Fame of marks is not dispositive in this matter.**

Franciscan claims that the "fame" of its marks somehow makes it more likely that confusion may result. However, we are not dealing with a product that enjoys a wide fame among the general populace like "Yellowtail" or other significantly famous wine brands.

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<sup>33</sup> *Coors, supra* at 1342.

<sup>34</sup> Engler Dec. ¶5-6; Bowman Dec. Ex. D.

Indeed, as shown from Mr. Engler's declaration, Franciscan's marks are only a subset of marks of its parent company, FVI and Constellation, which are better known.<sup>35</sup>

In short, Ravenswood wines are not so well known (or at least their mark is not so well known) as to be entitled to a presumption that use of BLACK RAVEN BREWING COMPANY will produce confused consumers.

**5. There is evidence that buyers of beer and wine are distinct and separate, indicating care in their purchases.**

The Study provided for the Wine Institute and the opinions from Mr. Engler indicate that beer buyers and wine buyers do not have much, if any, overlap.<sup>36</sup> This distinction indicates purchasers that are sophisticated and not impulse buyers. In other words, a beer buyer would not buy wine on an impulse as a replacement for beer, he or she would seek out their chosen product.

There is evidence that this factor favors BeauxKat.

**6. Any confusion that may result in this matter would by definition be DeMinimis.**

BeauxKat does not deny that Franciscan has its marks and uses them. But the evidence is clear that BeauxKat will be brewing a local microbrew with a small distribution, if any. The likelihood that any consumer will have an opportunity for confusion is unsubstantiated by Franciscan at the best, and extremely unlikely at the worst.<sup>37</sup>

The worst-case scenario is that a single person, entering a shop like Mr. Engler's Malt and Vine, here in the Seattle area, might see Ravenswood wine on one shelf, and then see a Black Raven beer in another area of the store in a refrigerated case. There is no plausible scenario in which such a happening is going to be regular or substantial. If confusion results, it will be deMinimus, and therefore this factor supports BeauxKat.

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<sup>35</sup> Engler Dec. ¶7-8.

<sup>36</sup> Engler Dec. ¶5-6; Bowman Dec. Ex. D.

<sup>37</sup> Franciscan even floats the idea that their wine may be served at the BeauxKat brewery. Certainly after the experience of this opposition, such an occurrence is so unlikely as to be nearly impossible.

#### **IV. CONCLUSION**

Franciscan sells a specialized product, wine. BeauxKat produces a specialized product, microbrewed beer. In truth, there is little crossover between these markets. Moreover, the marks have enough distinction that a consumer is not likely to be confused. The Board should uphold the decision of the Examiner and deny this summary judgment motion.

DATED this 5<sup>th</sup> day of January, 2009.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Applicant's Response to Opposer's Motion for Summary Judgment was forwarded by first class, postage pre-paid mail by depositing the same with the U.S. Postal Service on this 5<sup>th</sup> day of January, 2009 to the Opposer at the following address:

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